

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

J & J SNACK FOODS CORP. and
J & J SNACK FOODS CORP. HEALTH
AND WELFARE PLAN,

Plaintiffs,

v.

CAROLE F. KAFFRISSEN, ESQ., et al.,

Defendants.

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: CIVIL ACTION
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: NO. 98-5743
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MEMORANDUM

R.F. KELLY, J.

MAY 9, 2000

Before this Court is the Renewed Motion of Plaintiff-Intervenors, J & J Snack Foods Corporation and J & J Snack Foods Corp. Health and Welfare Plan ("J & J") to Disqualify Thomas D. Schneider, Esquire, as attorney for Defendants Kathleen Gorski Dowd, Matthew Dowd, Carole F. Kafrissen, Esquire and Law Offices of Carole F. Kafrissen, P.C., in the above-captioned case. For the following reasons, J & J's Motion will be granted.

I. BACKGROUND

J & J is a New Jersey corporation that self-insures its employees under its Health and Welfare Plan (the "Plan"), a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). On June 23, 1995, James Dowd, an employee of J & J, was involved in an automobile accident. Three days later, on June 26, 1995, he died from the injuries he sustained.

James Dowd incurred approximately \$83,000 in hospital

bills for the medical care he received as a result of the accident. The Plan advanced \$83,000 to cover the hospital expenses for the benefit of Dowd and his dependents.

Subsequently, James Dowd's estate instituted a wrongful death action and a survivorship action against the driver of the vehicle that caused the automobile accident, Ryan Walsh. The case was heard in this Court, and Dowd's estate and his wife were represented in the litigation by Carole F. Kafrissen, Esquire. It was J & J's understanding that the Plan was entitled to a refund of the benefits from the proceeds of any recovery realized from the underlying lawsuit. The lawsuit was ultimately settled for \$975,000. The terms of the settlement allocated \$900,000 to the wrongful death claim and \$75,000 to the survivorship claim.

In this action, J & J and the Plan claim that Kafrissen, Dowd's Estate, Dowd's wife and other beneficiaries of the Dowd Estate are liable to J & J and the Plan for the \$83,000 in hospital expenses that were advanced for Dowd's medical expenses. These parties further allege that the allocation of the \$975,000 settlement proceeds was unreasonable, arbitrary, capricious, and/or fraudulent; that the allocation of \$75,000 to the survivorship claim was unreasonably low; and the allocation of the \$900,000 was unreasonably high. It is J & J's belief that the settlement was intentionally allocated in that manner in order to defeat the rights of J & J and the Plan to recover the

\$83,000 advanced for Dowd's medical expenses.

Prior to the settlement of the Dowd's claim in the underlying action, J & J, through its representatives, wrote four letters to the estate's attorney, Ms. Kafrissen, asserting claims against the proceeds of the underlying litigation. Ms. Kafrissen did not answer any of those letters.

When J & J learned of the settlement, it moved to intervene and asserted claims against the estate, the beneficiaries of the estate, Ms. Kafrissen and ultimately, by way of amended complaint, Mr. Walsh. That motion to intervene was granted. An answer was filed on behalf of Ms. Dowd and the beneficiaries of the estate and the estate itself by Mr. Schneider who also entered his appearance on behalf of Ms. Kafrissen, the attorney.¹

II. STANDARD

"A district court has power to disqualify an attorney deriving `from its inherent authority to supervise the professional conduct of attorneys appearing before it.'" Shade

¹ Since the commencement of the instant action, J & J's claim against Thomas Dowd has been dismissed without prejudice. Thomas Dowd was not served with process in this case within the 120-day period set forth in Rule 4(m), but rather was served 444 days following the commencement of this action, when much of the pretrial proceedings had already been completed. Mr. Schneider had been conducting the proceedings on the behalf of all of the defendants' prior to service of process even though he had no authority to act on Thomas Dowd's behalf and had never communicated with him about the case.

v. Great Lakes Dredge & Dock & Co., 72 F. Supp.2d 518, 519 (E.D. Pa. 1999) (quoting United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)).

[T]he court should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions.

Miller, 624 F.2d at 1201. "The party seeking to disqualify opposing counsel bears the burden of clearly showing that continued representation would be impermissible." Cohen v. Oasin, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994) (citing Commercial Credit Bus. Loans, Inc. v. Martin, 590 F. Supp. 328, 335-36 (E.D. Pa. 1984)). However, any doubts as to the existence of a violation of the rules should be resolved in favor of disqualification. See Int'l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978).

III. DISCUSSION

The Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania provide the standards for professional conduct that attorneys appearing before this Court must comply with. Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1203 (E.D. Pa. 1992). Rule 1.7 of the Pennsylvania Rules of Professional Conduct, entitled **Conflict Of**

Interest: General Rule, states the following:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is under taken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

On June 4, 1999, this Court held a hearing regarding J & J's Motion to Disqualify Tom Schneider, Esquire, as attorney for Carole Kafrissen, Esquire of the Offices of Carole Kafrissen, Ms. Kathleen Dowd and Ms. Dowd's two sons. The basis of J & J's motion is that Ms. Dowd may have possible claims against Ms. Kafrissen and, thus, there is a probable potential conflict of interest which may subject a judgment in this case to a collateral attack under some theory of inadequate representation. Prior to the June 4th hearing there was no evidence of waiver. Accordingly, this Court suggested that Ms. Dowd be present for

the hearing.

Mr. Schneider, on behalf of the Kafrissen and Dowd defendants, argued at the hearing that there is no conflict because there is no conflict in defenses. According to Schneider, the letters received by Ms. Kafrissen never contained actual notice of J & J's ERISA claim, but, instead used the term "subrogation lien," the meaning of which Schneider contends was unknown to Ms. Kafrissen. Schneider explained that Ms. Kafrissen did inform Ms. Dowd that Kafrissen had received letters which had terms like "subrogation lien," but there was no need to respond, arguing that, under Pennsylvania law, there is no such thing as a subrogation lien. (N.T., dated 6/4/99, at 6-7.) Because both the Dowd defendants and the Kafrissen defendants will be alleging the same defense - that they were aware of letters referring to subrogation liens, but had no knowledge of the meaning of the letters or what Plaintiffs are now trying to assert, Mr. Schneider contends that there is no conflict that requires his disqualification as attorney for all defendants.

In response, counsel for J & J highlighted the fact that Ms. Dowd may be better served by inconsistent defenses, or at least alternative defenses, by way of, for example, a cross-claim or a claim for indemnity. In support of their position, J & J cites Lease v. Rubacky, 987 F. Supp. 406 (E.D. Pa. 1997), a case where a law firm and its client sued a doctor, Gerald

Rubacky, M.D., for breach of contract in failing to testify as a medical expert in the client's underlying medical malpractice action. The plaintiffs alleged that the expert's refusal to testify forced plaintiff, Lease, to withdraw her claims. The defendant moved to disqualify plaintiffs' attorney from jointly representing the law firm and Lease under the conflict of interest rule because those parties had adverse interests in that the law firm could be held directly responsible for any injury to Lease due to its malpractice in failing to obtain another expert for trial after the alleged breach by Rubacky. The court disqualified the law firm from representing Lease in the case against the expert, recognizing that the potential latent claims presented directly adverse interests and that the law firm would not likely advise Lease to pursue her malpractice claims against it in an effort to recover for her injury. In doing so, the court concluded that, although the existence of potential claims does not automatically disqualify the attorney, when the potential claims are such that their existence affects the adequacy of representation, then the interests are too adverse to allow joint representation. 987 F. Supp. at 408.

As in Lease, the Kafrissen and Dowd defendants have directly adverse interests. Indeed, another court could decide that Ms. Kafrissen's legal advice to Ms. Dowd or that the information communicated by Kafrissen to Ms. Dowd was improper.

Accordingly, this Court requested that Ms. Dowd take the witness stand to clarify her communications with Ms. Kafrissen.² On cross-examination by counsel for J & J, Ms. Dowd testified as follows:

Q Okay. When did you learn that Mr. Schneider was representing you and the estate and your sons?

A A couple months ago.

Q Have you ever - did you - were you aware that your husband was receiving benefits from J&J Snack Foods?

A Yes.

Q Health benefits?

A Yes

Q And, were you aware that there was - that J&J was paying for part of those benefits, at least?

A No.

Q The - you've testified that you did not see any of the four letters that J&J or its representatives sent to Ms. Kafrissen before the lawsuit settled, did you say that? That would be letters 2 through 5 in that package, if you want to look again.

A No.

Q Okay.

A Carole discussed - you know, read them to me, discussed them and I never personally seen them -

² Ms. Dowd's full name is Dowd-Roberts, as she has remarried in 1997, two years after the death of James Dowd.

Q All right.

A - or handled them.

Q And, Ms. Kafrissen said to you that the letters meant nothing?

A Correct, with the subrogation lien.

Q Okay. Has anybody discussed with you the possibility that Ms. Kafrissen is mistaken and that the letters mean something?

A No.

. . . .

Q Does the term - when did you first hear the term ERISA?

A I don't understand what ERISA means.

Q Okay. Did you - whether or not you understood, have you ever heard that term before I just mentioned it to you today?

A No.

Q Are you aware that there is a statute of limitations for legal malpractice in Pennsylvania of two years?

A No, I don't know much about the law.

. . . .

Subsequently, this Court further questioned Ms. Dowd about her understanding about the conflict of interest at issue:

BY THE COURT:

Q Are you willing to have present counsel represent you even though he's representing -

A Yes, I am.

Q - Ms. Kafrissen? There may be a

conflict of interest.

A I don't have no conflict of interest.

Q It is possible that - and I don't know enough about this case, frankly, to know what the outcome is likely to be, but if - it could be that there would be an award in favor of the plaintiff for the amount of \$83,000, do you understand that?

A Yes, I do.

Q Do you understand that depending upon what the circumstances are or were you might have a cross-claim against your former attorney, Ms. Kafrissen, do you understand?

A I have no conflict. I have no reason.

THE COURT: Anyone else have any other questions?

MR. SCHNEIDER: No, Your Honor.

RECROSS-EXAMINATION

BY MR. HUNT:

Q Has anybody suggested to you that you get an attorney separate from Mr. Schneider or Ms. Kafrissen to look at this matter?

A No.

MR. HUNT: Nothing further.

MR. SCHNEIDER: I have nothing further.

THE COURT: Yeah, I think you would do well to consult a separate attorney to - just for advice.

MS. DOWD-ROBERTS: I don't feel that I have to.

(N.T., dated 6/4/99, at 23-28.)

Although this Court, on June 8, 1999, initially denied Plaintiffs' Motion to Disqualify Mr. Schneider from acting as counsel for both the Kafrissen and Dowd defendants, a closer review of the above testimony leaves this Court with serious doubts as to whether Ms. Dowd realizes that she could have a legal malpractice action against Ms. Kafrissen and her law offices. In addition, the above testimony gives no indication that any representative from Ms. Kafrissen's law firm ever performed the necessary consultation with Ms. Dowd regarding the conflict at issue. Accordingly, this Court finds that Ms. Dowd's potential claims against the Kafrissen defendants creates directly adverse interests that affect the adequacy of representation. Furthermore, it is unreasonable for Mr. Schneider, an associate employed by the law offices of Carole Kafrissen, P.C., to believe that he can adequately represent both the Dowd defendants and the Kafrissen defendants. Moreover, as the J & J plaintiffs point out, since Mr. Schneider has been representing both defendants, he should now represent neither, as confidential information may have passed from one to the other. Therefore, Thomas D. Schneider, Esq., is disqualified from representing both the Kafrissen and Dowd Defendants in this matter.

An appropriate Order follows.

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ORDER

AND NOW, this 9th day of May, 2000, upon consideration of the Renewed Motion filed by Plaintiff-Intervenors J & J Snack Foods Corporation and J & J Snack Foods Corp. Health and Welfare Plan ("J & J") to Disqualify Thomas D. Schneider, Esquire, and all responses thereto, it is hereby ORDERED that J & J's Motion is GRANTED, and Mr. Schneider is disqualified from serving as counsel for both the Kafrissen and Dowd Defendants in the above-captioned matter. It is further ORDERED that all pending motions will be STAYED for a period thirty (30) days to allow the Kafrissen and Dowd defendants to obtain separate counsel, other than Thomas D. Schneider, Esquire.

BY THE COURT:

ROBERT F. KELLY, J.